Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-927

JOHN J. WILD, M. D.,

Appellant,

vs.

FRANK M. RARIG, MINNESOTA FOUNDATION,
a Minnesota nonprofit corporation,
and AMHERST H. WILDER FOUNDATION,
a Minnesota nonprofit corporation,

Appellees.

APPELLANT'S RESPONSE TO MOTION TO DISMISS

JAMES MALCOLM WILLIAMS
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I. Introduction

Just as the appellees did everything in their rather awesome "power" to prevent a fair and impartial appellate decision on the merits before the Minnesota Supreme Court and its companion panel by employing the professionally

distasteful "ol' boy fraternity brother" techniques, (See Resp. Brief and Petition for Rehearing) so, too, the "motion to dismiss" resorts to essential fallacy and subjective terminology to avoid the issues, the facts and the merits. (Former members of the appellees' law firm and the "Otis" law firm are now on this Court. No mention of this fact appears in the motion either.)

The issue is whether or not the appellee was deprived of his constitutional right to due process and equal protection of the law by the enactment and application of the legislation involved.

The merits are clear - the appeal below was a shocking constitutional mockery. Dr. Wild was intentionally deprived of equal protection and due process in an appellate proceeding which was obviously "controlled" in every essential in favor of the appellees. (e.g., "Misconduct" on the part of appellees' [defendants below] attorney is rewarded with a new trial. Thus, in Minnesota, a defendant who is losing a lawsuit on the merits can avoid the loss by having his lawyer commit mis-

conduct.)

The facts constituting this travesty are completely ignored in appellees' motion. The ludicrous claim is made at Page 15, that "facts" constituting constitutional deprivation cannot be considered by the United States Supreme Court and in some mystical way are somehow the exclusive property of the states.

This answer would be unduly prolonged if we reviewed all the facts. We, however, suggest you review Mr. Graham's affidavit appended hereto as well as the quotation from Dr. Wild's allegations under oath relative to criminal conspiracy surrounding the enactment of Chapter 18 (Minn. Stats. 2.724, Subd.2 [1974] - See Appendix I.)

It is of considerable importance that the appellees' motion to dismiss completely ignores the activities of the Minnesota Supreme Court which led to the passage of the legislation in near-record time as a piece of "routine Judicial Administration". (See Appendix II re: some of those circumstances.)

II. Argument

The contentions (1) Evasion (i.e., Matter not presented or ruled on below); (2) Irrelevance (i.e., No real federal constitutional question material to decision below); and, (3) Triviality (i.e., Even if there is a constitutional question, it is so trivial that the United States Supreme Court should ignore it), are at best gross subjectivisms contrary to the law and facts cited in the Jurisdictional Statement.

Using sophistry, gross oversimplifications, avoidance of fact and fundamental law, perversion of the record (e.g., Page 3, ". . . ancient wills . . . "), and the significance of the record below (e.g., ". . . all of the various affidavits, motions and petitions filed by appellant were designed to prevent a hearing of the appeal . . . "), are used by the appellees to the end that mere verbosity and conventional legalistic jargon become a complete substitute for facts, principles and logic. (See Temporary Court Decision below, Appendix to

Jurisdictional Statement, itself another "paragon of artificial pettifoggery"). This Court is subjected to a man-made blizzard of irrelevant citations designed to blind one to justice, to reason and to the facts.

For instance:

(1) The appellees do not even make a nude claim that the appellant had due process and equal protection below -- for they know it is not so and the record proves it;

(2) The appellees do not claim that the temporary panel was qualified to decide the appeal for the panel was clearly prejudiced and handpicked to carry out the wishes of the permanent court;

(3) The appellees do not even claim that the decision below was fair and impartial for the decision <u>proves</u> the extreme prejudice of the panel. (See Petition for Rehearing) The appellees refusal to discuss the opinion below in their motion is a <u>tacit</u> admission of gross federal constitutional depri-

vation; and,

(4) The appellees also completely ignored the corollary issues which are of such great import to the administration of appellate justice.

It is difficult to conceive of a situation in which an appellant could have done more to give both appellate courts below the opportunity to face the federal constitutional issues. They certainly decided them either directly or by outright refusal. (See Jurisdictional Statement.) The allegation, in effect, that equal protection and due process in appellate proceedings is so trivial as to warrant this court's judicial indifference is without rational support. Equally, the suggestion that the constitutional matters are irrelevant to the decision below is unsupported. These bald assertions are in the nature of authoritarian edicts which require no law, principle or reasoning. There is nothing whatsoever in the appellees' motion that lends factual or constitutional justice in support of these autocratic

pronouncements.

Dr. Wild feels strongly that if this Court adopts the appellees' unsubstantiated subjective concepts of evasion, irrelevance or triviality as a device to avoid the responsibility to hear this important and meritorious matter, it will amount to a total and unjustified absquatulation from constitutional duty by the highest court of our land. It will entail a breakdown in the administration of justice in the Federal Judiciary at its highest level, comparable and analogous to that judicial failure that has already occurred in Minnesota.*

Dr. Wild stated that a failure to review would amount to allowing ". . . the practice of license without a law

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*It is interesting that the State of Minnesota Attorney General has adopted the appellees' motion (See Feb.2,1976 letter to Clerk Rodak): ". . . we do, however, agree with appellees' contention that the above-entitled appeal should be dismissed for the reasons set forth in the brief in support of their motion to dismiss."

. . ." on the part of the Minnesota Supreme Court.

Respectfully submitted,

JAMES MALCOLM WILLIAMS
Attorney for Appellant
212 West Franklin Avenue
Minneapolis, Minnesota 55404

APPENDIX I

". . . defendants did willfully, wrongfully and unlawfully conspire, confederate and agree with each other to corruptly influence members of the Minnesota State Legislature by willfully, wrongfully and corruptly influencing the vote and performance of duties of members of the Legislature of the State of Minnesota, . . . by corrupt deception and corrupt concealment of facts from the aforesaid legislators in and as part of the Minnesota Supreme Court's recommendation and sponsorship of the legislation involved herein, including the following:

A. Concealment - The defendants and each of them, acting personally and through defendants Klein and Davies, did unlawfully and feloniously conceal:

1. The true nature and extent of the influence on the Minnesota Supreme Court of the St. Paul Companies and the Amherst Wilder Foundation inducing the Minnesota Supreme Court to falsely sponsor the legislation invol-

ved herein as routine judicial administration, to-wit: as delineated below.

2. The true nature and extent of the private financial interest in the proposed legislation of the St. Paul Companies and the Amherst Wilder Foundation inducing the Minnesota Supreme Court to falsely sponsor the legislation involved herein as routine judicial administration, to-wit: as delineated below.

3. The true nature and relevance of the legislation to specific pending litigation, also inducing the Minnesota Supreme Court to sponsor the bills as routine judicial administration, to-wit: Wild v. Rarig, Amherst Wilder Foundation and Minnesota Foundation, to wit: as delineated below.

4. The true nature and relevance of the legislation to the private financial interests of members of the Minnesota Supreme Court, to-wit:

a. Defendant Otis' substantial ownership of stock in the St. Paul Companies;

b. Defendant Otis' position as a Vice President and board member of

Amherst Wilder Foundation and Minnesota Foundation, defendants in Wild v. Rarig, Amherst Wilder Foundation and Minnesota Foundation;

c. The Supreme Court's interest in protecting the assets of Wilder as "visitors" of that organization (defined as protectors of [Wilder's] assets);

d. Defendant Justice Otis (as official and board member of Wilder);

e. Amherst Wilder's interest of over 65-million dollars (and as Visitors, the other defendant Justices of the Supreme Court) in protecting the assets of the St. Paul Insurance Companies;

f. Justice Otis' voting with other board members on behalf of Wilder Foundation, of over 650,000 shares of St. Paul Companies' stock;

g. That, therefore, Wilder, in effect, exercises substantial control over the St. Paul Companies (large insurance group involved as well with other cases and appearing

regularly before the said Supreme Court, said cases directly concerned with the financial interests of the said St. Paul Companies);

h. Therefore, Wilder, its officers, defendant Otis and Visitor-Trustees Knutson, Rogosheske, Peterson, Kelly, Todd and MacLaughlin, have personal private interests in protecting the assets of St. Paul Companies as well as those of Amherst Wilder;

i. That defendant Justice Otis had in fact testified in the relevant pending litigation (i.e., Wild v. Rarig, Wilder and Minnesota Foundations);

j. That by allowing the Supreme Court to appoint its own replacements in the pending litigation, the defendant-Justices of the Supreme Court herein could avoid public responsibility and exposure for their conflicts of interest, yet, still control the outcome of the appeal for their own benefits and the benefits of the St. Paul Companies and Amherst Wilder;

k. That there would probably be, and was, an appeal to the Minnesota Supreme Court in the Wild case of an over 16-million dollar verdict which would be in fact an appeal of the Supreme Court's own case to itself;

l. Affidavits of prejudice would, under the facts, undoubtedly be filed, and were filed, (including the personal associations of the Supreme Court members), which would and did require the entire court to disqualify itself; and,

m. That an appeal in the Wild case would, in effect, amount to the Supreme Court passing on its own appeal, and, therefore, the Court's appointing its own replacements would be unfair.

5. Did not disclose to the Legislature the ethical, legal and constitutional difficulty and improprieties in allowing a disqualified (i.e., prejudiced or personally interested) judge to appoint his own replacement and how this was minimized in the prior const-

itutional provision by having the governor or lt. governor appoint their replacements in the event of disqualification of the entire Supreme Court or a majority of its members.

6. Nature and extent district court judges are dependent upon the goodwill of Supreme Court both statutorily and situationally, e.g., (a) assignments after retirement for additional income, and, (b) Pro tempore assignments to serve on the Supreme Court when no disqualification is involved.

7. Did not disclose that the governor and lt. governor powers of appointment for disqualified judges had been taken from them in a recent amendment to the Minnesota Constitution where this provision was hidden from the voters (people) on the ballot.

B. Deception - the defendants and each of them acting personally and through the defendants Klein and Davies did unlawfully and feloniously deceive the aforesaid legislators as follows:

1. Represented that allowing the disqualified judges to appoint their own

replacements was only to reestablish an old constitutional provision where, in truth and fact, the governor or the lt. governor appointed the Supreme Court temporary replacements when a majority of the justices were disqualified under the Old Constitution for over 75 years.

2. Represented that the legislation (to-wit: House File 430, Senate File 3405, Chapter 18, Laws, 1973), was merely routine pro forma judicial administration legislation as an aid to concealing the true purpose of the bill and what it was really designed to do, to-wit:

a. Allow the Supreme Court to control its own appeal;

b. To protect the assets of the Amherst Wilder Foundation and the St. Paul (Insurance) Companies;

c. To prevent public hearings on the bills; and,

d. To prevent Dr. Wild or his lawyers from appearing before the committees and being instrumental in getting fair and constitutional

legislation passed, i.e., legislation that would insure a fair and impartial appeal panel, not one that would allow the personally-involved Supreme Court to control its own appeal all with the intent then and there entertained by the defendants and each of them to thereby corruptly influence the said legislators as designated above in respect to their vote and performance of their duty in this respect, to-wit: to vote for, recommend for passage and to pass House File No. 430 and Senate File No. 3405 in hasty and ill-considered fashion, without public hearing and notice to interested citizens and adequate and proper consideration by the said legislators of the ramifications of the legislation by the defendants presenting said bills. The defendants employed the false and fraudulent misrepresentation that the bills were routine judicial administration legislation when, in truth and fact, the said legislation was fraudulently designed to allow the

regular Supreme Court to control their own appeal as aforestated and to continue control of any other appeal when the Court or its members may be financially or otherwise personally interested by allowing the disqualified judges to appoint their own replacements at their personal discretion, all contrary to M.S.A. 609.425."

APPENDIX II

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1975
NO. 75-951

John J. Wild, M.D.,
Appellant,

-vs

Frank M. Rarig, et al.
Appellees.

AFFIDAVIT

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Your Affiant, JOHN REMINGTON GRAHAM, on solemn affirmation, deposes and says:

That he is a member of the Bar of the Minnesota Supreme Court, and of this Court. Your Affiant acted as junior counsel for Dr. Wild in this matter in the Minnesota District Court for Hennepin County and the Minnesota Supreme Court, but does not so act here, and has not actively participated in this matter for the better part of one year, due to pressing obligations elsewhere. This Affidavit has been prepared at the request of Mr. Williams to clarify

facts of public record in or related to this matter, so as to facilitate disposition of this Appeal.

While preparing for the anticipated Appeal of the Wilder Foundation to the Minnesota Supreme Court, your Affiant determined the following facts:

Under the Will of Amherst H. Wilder, executed in 1893, one-third of his estate went to his wife, Fanny Wilder; one-third went to his daughter, Cornelia Appleby, and one-third went to his testamentary trustees, who, as directed, established by incorporation the first Wilder Charity.

Under the Wills of Cornelia Appleby and Fanny Wilder, both executed in 1902, their estates went to their testamentary trustees, who as directed, established by incorporation the second and third Wilder Charities. The 29th Article of both of these latter instruments read, "I hereby earnestly request, and I hereby fully empower such persons (as individuals, however, and not as Judges) as may from time to time be acting Judges of the Supreme or highest court of

the State of Minnesota, to exercise frequently visitorial powers over the administration of this Fund and Charity . . . "

The merger of the three Wilder Charities was made possible by Chapter 222 of Minnesota Laws of 1909, which ordained that several charitable corporations could merge into one charitable corporation which would succeed to all of the "rights, powers, franchises, contracts, privileges, immunities, duties, liabilities, and obligations" of the original corporations. The merger of the three Wilder Charities was approved by state decree in equity, and effected by the incorporation of the Wilder Foundation.

Blackstone states that a visitor of an eleemosynary corporation has all the powers of the founder to see that the assets are rightly employed. 1 Bl. Com. 480-481.

In addition, it was made clear from disclosures at trial (in open court and chambers) that the Wilder Foundation owns 6 or 7 % of the capital stock of St. Paul Companies; that St. Paul Companies is the liability insuror of the Wilder Foundation; and that Justice James C. Otis is a vice president and trustee of the Wilder Foundation. It may be added that Justice Otis has been and apparently still is a holder of substantial stock in the St. Paul Companies.

Article VI, Section 3 of the Minnesota Constitution, as amended in 1876, provided "District judges may act where supreme court judges are disqualified. Whenever all or a majority of the judges of the supreme court shall, from any cause, be disqualified from sitting in any case in said court, the governor, or, if he shall be interested in the result of such case, then the lieutenant governor, shall assign judges of the district court of the state, who shall sit in place of such disqualified judges, with all the powers and duties of judges at the supreme court."

Minnesota Statutes, Section 542.13, which dates back to territorial days, defines judicial disqualification as follows, "No judge shall sit in any cause . . . if he be interested in its

determination, or if he might be excluded for bias from acting therein as a juror."

By amendments in 1956 and 1972, the old Article VI, Section 3 of the Minnesota Constitution was displaced by a new Article VI, Section 2, which reads, "Judges of the district court may be assigned as provided by law temporarily to act as judges of the supreme court on its request."

On March 9, 1973, shortly after the Appeal of the Wilder Foundation to the Minnesota Supreme Court, was filed, Chapter 18 of Minnesota Laws of 1973 was promulgated. The statute provides, "Any number of justices may disqualify themselves from hearing and considering a case, in which event the supreme court may assign temporarily a retired justice of the supreme court or a district judge to hear and consider the case in place of each disqualified justice."

In late February and early March of 1974, your Affiant investigated the legislative history of the statute. The bills which eventuated in the enactment

were introduced in the Minnesota Legislature, at the request of the Minnesota Supreme Court, on February 2, 1973, as House File No. 430 and Senate File No. 400. According to legislative minutes, the bills were discussed in the Senate Subcommittee on Judicial Administration on February 6, 1973; the House Committee on the Judiciary on February 8, 1973; and the Senate Committee on the Judiciary on February 13, 1973.

A tape recording of the hearing on Senate File No. 400 in the Senate Subcommittee on Judicial Administration, on file with the Secretary of the Minnesota Senate, reveals that the bill was advocated by Senator Jack Davies, Chairman of the Senate Committee on the Judiciary. Following initial desultory discussion, Richard E. Klein, Esq., Administrator of the Minnesota Supreme Court, was introduced to explain the bill. He was covertly told not to be "too specific" by Senator Davies, whose words are nevertheless audible on the tape. Mr. Klein mentioned nothing of the Appeal of the Wilder Foundation to

the Minnesota Supreme Court. He did say that before 1956, the Minnesota Constitution empowered the Minnesota Supreme Court "to replace itself" when necessary. The bill, he said, would simply restore this self-replacing power, which had been inadvertantly expunged in 1956, although he mentioned nothing of the old provision in the pre-1956 state constitution giving the governor or lieutenant governor that power. On this imperfect information, the subcommittee approved the bill, in the form eventually enacted, giving disqualified justices the power of self-replacement.

When your Affiant sought to listen to a tape recording of the hearing on House File No. 430, he was given a tape contained in a box marked "H.F. No. 430 2/8/73 R.J.P." But this tape does not disclose what occurred: there is some miscellaneous material, and then a long blank, suggesting the possibility of erasure. The minutes of the House Committee on the Judiciary do indicate, however, that Mr. Klein appeared to explain

the bill.

All other legislative records reveal that passage of House File No. 430 and Senate File No. 400 into Chapter 18 of Minnesota Laws of 1973 was thereafter routine and uneventful. No notice of any legislative hearings was ever given Dr. Wild until after the fact. See the Memorandum of the Minnesota Supreme Court. February 21, 1973, refusing recusation initially; and Letter of Mr. McCarthy to Mr. Williams, March 12, 1973, stating that the permanent Justices had recused themselves en banc pursuant to Chapter 18 of Minnesota Laws of 1973.

Subsequently, in the same year, Dr. Wild brought suit in the United States District Court for Minnesota seeking equitable supervision of the process of selecting the temporary Justices of the Minnesota Supreme Court in the Appeal of the Wilder Foundation, so as to preclude the secret and personal discretion of any fiduciary of the Wilder Foundation. Wild v. Knutson, et al., D. Minn. No. 4-73 Civ. 473, aff'd 8th Cir. No. 74-1137.

By January, 1974, it was apparent to your Affiant, that a major ethical crisis in the judiciary of his State might well erupt, very much against the public interest and possibly harmful to the reputations of blameless persons, unless a prompt solution were found. After obtaining permission of Mr. Williams and Dr. Wild to seek such an accommodation as a private citizen, your Affiant approached State Senator Winston Borden, representing the district wherein your Affiant is domiciled, just before the opening of the 1974 Session of the Minnesota Legislature. The following letter from your Affiant to Senator Borden, written after initial oral conversation, is self-explanatory:

"January 31, 1974
Hon. Winston Borden
Minnesota State Senate
State Capitol Building
St. Paul, Minnesota 55101

Dear Senator Borden:

This is to confirm our appointment for dinner on Tuesday, February 5, 1974, at which time I propose to discuss with you ameliorative legislation concerning judicial administration. Be advised that I have registered with the Secretary of the Senate.

Article VI, Section 3, of the Minnesota Constitution as amended in 1876, reads: "District judges may act where supreme court judges are disqualified. Whenever all or a majority of the judges of the supreme court shall, from any cause, be disqualified from sitting in any case in said court, the governor, or, if he shall be interested in the result of such case, then the lieutenant governor, shall assign judges of the district court of the state, who shall sit in place of such disqualified judges, with all the powers and duties of judges of the supreme court." This provision remained on the books until amendments in 1956 and 1972, causing the Minnesota Constitution now to read, in Article VI, Section 2: "Judges of the district court may be assigned as provided by law temporarily to act as judges of the supreme court upon its request."

When the case of Wild v. Rarig, et al. was appealed, the plaintiff-respondent sought to have the judges of the Supreme Court disqualified on a variety of grounds, which need not be labored here: Suffice it to say that his grounds include the present Chief Justice and Justices Yetka and Scott, and are not limited to formal cause only. The court, as then composed, refused to file his affidavits of prejudice. Acc-

ordingly he sought to file formal motions for recusation of the whole court, supported by detailed affidavits and exhibits.

A few days before his motions were filed, the Legislature, at the request of the Supreme Court, enacted Chapter 18 of the Laws of 1973, which reads, as an amendment to Section 2.724, Subdivision 2, of Minnesota Statutes of 1971: "Any number of justices may disqualify themselves from hearing and considering a case, in which event the supreme court may assign temporarily a retired justice of the supreme court or a district judge to hear and consider the case in place of each disqualified justice." This was done routinely, without hearing or debate, and without notice to any interested party except the Supreme Court.

He was then advised that the whole court had disqualified themselves pursuant to the new statute, and would in due course appoint their replacements. Immediately he inquired what method would be used to appoint new judges. His concern had been to assure a method of selection that would preclude the personal discretion of the disqualified judges. The court have positively refused to disclose when or how the temporary judges shall be appointed. For a number of reasons, he suspects something irregular in this business.

He believes that it would be unconstitutional for disqualified judges to appoint their replacements at personal discretion. See, e.g., Payne v. Lee, 222 Minn. 269 (1946). You suggested that Chapter 18 of the Laws of 1973 be amended with the words: "Provided that whenever a majority of the judges of the supreme court shall, from any cause, be disqualified from sitting in any case in said court, the governor, or, if he shall be interested in the result of such case, then the lieutenant governor shall assign judges of the district court of the state, who shall sit in place of such disqualified justices with all the powers and duties of the supreme court." The proposal is impartial, since it was the law of this State for some 80 years. It certainly is constitutional. See, e. g., State ex rel. Young v. Brill, 100 Minn. 499 (1907). If enacted into law, it would considerably dispell the appearances of impropriety.

I suggest further that the bill be heard in committee, with notice to all parties in Wild v. Rarig, et al., and the Supreme Court. I am authorized to advise you that Harry H. Peterson, former Judge of the Supreme Court, would like to testify in favor of the measure in committee.

Please be advised that my efforts

in behalf of this bill are personal. I am not acting in behalf of Dr. Wild or his senior counsel, Mr. Williams. All expressions of opinion herein are mine and mine alone.

Thanking you for your attention, I am

Respectfully yours,

/s/John Remington Graham"

At the dinner conversation on February 5, 1974, the Senator produced a draft of a bill in conformity with his prior suggestion. He asked your Affiant whether the Chief Justice of the Minnesota Supreme Court should be consulted, to which your Affiant gave emphatic assent, pointing to the penultimate full paragraph of the above-quoted letter. The Senator agreed to do so, saying that he would see the Chief Justice in a few days.

Sometime later your Affiant telephoned the office of Senator Borden to inquire concerning the bill. He was advised by a legislative assistant that the Chief Justice had been contacted; that no lawyer, including Senator Borden, wished to introduce the bill in his name; and that, nevertheless, the bill had been introduced

as Senate File No. 3406 by Senator David Schaaf (not an attorney). Senator Borden confirmed these facts to your Affiant, but declined to elaborate on the details. A day or two later, your Affiant spoke with Senator Schaaf, who advised that the bill had been sent to the Senate Committee on the Judiciary, but the Chairman, Senator Jack Davies, had caused the measure to be tabled without hearing.

Following appointment of the temporary Justices of the Minnesota Supreme Court, your Affiant caused to be filed the following Motions in Wild v. Rarig, et al.:

(Caption Omitted)

"To Hon. Robert J. Breunig, Glenn E. Kelly, Rolf Fosseen, L. J. Irvine, Donald C. Odden, Chester G. Rosengren, C. A. Rolloff, James E. Preece, William T. Johnson, District Court Judges appointed to sit as Supreme Court Justices Pro Tempore in the above entitled cause pursuant to Chapter 18 of Minnesota Laws of 1973, and each of them, Greeting:

Comes now the aforesaid Respondent, and hereby makes the following motions, to-wit:

FIRST: That the aforesaid temporary

justices, individually and collectively, submit to voir dire interrogation by counsel for the respective parties hereto as at common law in the selection of jurors, and to self-recusation upon peremptory challenge or challenge for cause. So moved inter alia, since Minnesota Statutes, Section 542.13 provides 'No judge shall sit in any cause . . . if he be interested in its determination, or if he might be excluded for bias from acting therein as a juror.'

SECOND: That further, the aforesaid temporary Justices order the permanent, disqualified Justices of the Minnesota Supreme Court to make public disclosure of the method by which the appointments herein pursuant to Chapter 18 of Minnesota Laws of 1973, were made and to disclose the nature and extent of contacts, if any, with the temporary Justices prior to their appointments. So moved, inter alia, because the parties herein are entitled to know how the temporary Justices of this cause are selected as a matter of due process of the laws, lest any impropriety in such selection, whether by reason of constitutional provision, statute, common law, equity or ethical principle, remain unknown to the parties herein, or the public at large.

THIRD: That, further or alternatively to the foregoing motions, the aforesaid temporary Justices declare unconstitutional as applied to this cause, Chapter 18 of Minnesota Laws of 1973. So moved, inter alia, because under the

doctrine of Payne v. Lee, 222 Minn. 269, 24 N.W. 2d 259 (1946), Article I, Section 8 of the Minnesota Constitution, and Amendment XIV of the United States Constitution prohibit any disqualified judge (in this case the permanent Justices of the Minnesota Supreme Court) from acting in any way, either privately or at personal discretion, in the cause wherein he is disqualified, and this per force includes private or discretionary appointment of any temporary Justices to decide such cause.

FOURTH: That, further or alternatively to the foregoing motions, the aforesaid temporary Justices declare null and void in general application, Chapter 18 of Minnesota Laws of 1973. So moved, inter alia, because said Chapter 18 was enacted through unethical, wrongful, fraudulent, tortious and felonious acts, quasi-fiduciary non-disclosure, concealment and misrepresentation of facts, of and by the official representative of the Minnesota Supreme Court, as then constituted, before one or more committees of the Minnesota Legislature during the month of February, A. D. 1973.

FIFTH: That, further or alternatively to the foregoing motions, the aforesaid temporary Justices recuse themselves from hearing the above entitled cause, on grounds stated in Motions the Third and Fourth above set forth.

SIXTH: That, in any event, the afore-

said temporary Justices schedule a public hearing of arguments and evidence on the foregoing motions, with full and formal notice to the parties herein on Monday, May 6, 1974 at 9:30 a.m. in Room 584 of the Federal Building, 316 North Robert Street, St. Paul, Minnesota, or at such other place and time before the said May 6, 1974 as is convenient to the temporary Justices, in order to assure conscientious and thorough consideration thereof, before the merits of the above entitled cause are argued orally by counsel.

SEVENTH: That such further and alternative relief be given as justice may warrant.

The aforesaid temporary Justices of the Minnesota Supreme Court are hereby notified that, under the pressing circumstances herein, Respondent will be compelled to assume tacit denial of the foregoing motions unless said motions are heard and decided on or before the aforestated May 6, 1974.

"JAMES MALCOLM WILLIAMS
and
JOHN REMINGTON GRAHAM
By/s/John Remington Graham
. . .
(Supporting Affidavit Omitted.)"

These motions were heard and denied on May 6, 1974, but the temporary Justices invited disclosure of the mode of their appointment, which theretofore had been

refused. In response, the following statement issued under the signature of Chief Justice Sheran (May 8, 1974):

(Caption Omitted)

"The acting justices in the above entitled matter having suggested that it would be appropriate that a statement be made for the record outlining the process by which selection of district judges to hear the above entitled matter was made, it is stated:

(1) That one district judge was selected from each of the judicial districts in the State of Minnesota except the Second Judicial District (Ramsey County), in which appellant Amherst H. Wilder Foundation conducts its principal charitable activities;

(2) That the Chief Judge of each of the nine judicial districts was invited to participate in the decision of this case. The Chief Judge of each judicial district is selected by the judges of that district.

(3) In three judicial districts the Chief Judge of the district was unable to accept the invitation to serve. In these instances, the district judge senior in point of service was selected."

Dr. Wild has not sought to investigate the lives or backgrounds of the temporary Justices by covert means, lest their privacy be evaded. Yet the following illus-

trative, public facts, which are by no means exclusive, tend to impeach the selection process: (1) All permanent Justices of the Minnesota Supreme Court, including Chief Justice Sheran, a former counsel for St. Paul Companies, and Justice Otis, a fiduciary of the Wilder Foundation, and stockholder in St. Paul Companies, appear to have participated in selecting the method, secretly and at personal discretion. (2) All permanent Justices are ex officio visitorial fiduciaries of the Wilder Foundation, and they have done nothing to nullify their appointments, although long a matter of public record, and frequently called to their attention in this case. (3) Judge Rosengren, the temporary Chief Justice, is a former counsel of St. Paul Companies. (4) Judge Fosseen, a temporary Justice, is a personal friend of Justice Otis. (5) There are about seventy well-qualified Judges of the Minnesota District Court from which an impeccable selection could have been made.

Several aspects of the per curiam opinion of the temporary Justices are suspect, for example: The major claim of Dr. Wild

sounds in tort, namely, defamation, governed by a two-year statute of limitations, and malicious interference with prospective advantage, governed by a six-year statute, both alternate causes of action built upon the same facts. Torts governed by the two-year statute do not survive death of either party, while those governed by the six-year statute do. Virtue v. Creamery Pkg. Mfg. Co., 123 Minn. 17, 142 N.W. 930 (1913). The temporary justices held that the six-year statute generally applies to a cause of action for malicious interference, but in this case will be governed by the two-year statute at retrial. No authority is cited for this special application of the two-year statute. Wild v. Rarig, 234 N.W. 2d 775 at 793 (Minn. 1975). Yet the established common law of Minnesota has been that where the same facts constitute two wrongs, one governed by a two-year statute, and the other governed by a six-year statute, recovery may be had under the six-year statute. See Burke v. Mayland, 149 Minn. 481, 184 N.W. 32 (1921), which was

called to the attention of the temporary Justices several times.

. . .

FURTHER SAYETH YOUR AFFIANT NAUGHT.

/s/John Remington Graham

Subscribed and sworn to
before me this 10th day
of February, 1976.

/s/M. Jacquelin Stevenson
Notary Public, Hennepin County, Minn.
My Commission expires Dec. 17, 1979.